COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

9 NORTH WALKER STREET DEVELOPMENT, INC.

v.

REHOBOTH BOARD OF APPEALS

No. 99-03

DECISION OF THE COMMITTEE ON REMAND

November 6, 2006

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DECISION OF THE COMMITTEE ON REMAND

I. HISTORY

On April 7, 1999, the 9 North Walker Street Development, Inc. submitted an application to the Rehoboth Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 44 units of mixed-income affordable ownership housing on Bliss Street in Rehoboth, to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston.[1] The Board's denial of that application was appealed to this Committee. The matter was remanded to the Board, the proposal was reduced to 37 housing units, and on October 26, 2001 a permit for 16 housing units was granted. See Exh. 8.[2] The developer continued to pursue the appeal, a hearing was conducted, and the Committee

1. As described in more detail in the Committee's decision of June 11, 2003, the entire site is 57 acres, of which about half is wetlands. Thirteen houses are proposed on several acres of upland where the project roadway will enter the site from Bliss Street; the roadway will then cross about 400 feet of wetlands to a slightly larger upland area, where the remainder of the houses will be built. The developed upland area totals about 20 acres. There is also an isolated seven-acre upland area that will be given to the town and remain undeveloped. The site is zoned for residences on 60,000 square-foot lots.

2. References to exhibits are to documents admitted into evidence during the Committee's original hearing in 2002.

rendered a decision affirming the Board's decision. *9 North Walker St. Dev., Inc. v. Rehoboth*, No 99-03 (Mass. Housing Appeals Committee Jun. 11, 2003).

The Committee's decision was appealed to the Superior Court. The Court vacated our decision, ruling that the decision of the Board was a *de facto* denial rather than an approval with conditions. We requested that the Court reconsider its decision since it had not been apprised of our ruling with regard to a *de facto* denial in *Settlers Landing Realty Trust v. Barnstable*, No 01-08 (Mass. Housing Appeals Committee Sep. 22, 2003). The Court granted that request, and remanded the matter for the Committee "to make the determination as to whether there has been a denial or approval with conditions and thereafter proceed to render a final decision based on the evidence …." *9 North Walker St. Dev., Inc. v. Commonwealth*, C.A. No. 2003-0767, slip op. at 2-3 (Bristol Super. Ct. ruling May 12, 2005).

On remand, the presiding officer, based upon his judgment that the full Committee had had already considered the substantive issues and articulated its conclusions in *dictum*, acted independently and issued a decision on behalf of the full Committee. *9 North Walker St. Dev., Inc. v. Rehoboth*, No 99-03 (Mass. Housing Appeals Committee Decision on Remand Jun. 28, 2005). This ruling was also brought before the Court, which ruled that the matter should have been considered by the full Committee, and remanded the matter again. *9 North Walker St. Dev., Inc. v. Commonwealth*, C.A. No. 2005-00811, slip op. at 17-18 (Bristol Super. Ct. memorandum of decision Aug. 23, 2006).

The presiding officer permitted the parties to file supplemental briefs, and thereafter the full Committee considered the case. See *9 North Walker St. Dev., Inc. v. Rehoboth*, No. 99-03 (Mass. Housing Appeals Committee order Sep. 18, 2006).

As will be seen below, after full consideration, we conclude that the Board's denial of a comprehensive permit is not consistent with local needs, and we do so in terms similar to and in some cases in the exact words of our original decision and the presiding officer's ruling on remand.

II. *DE FACTO* DENIAL

In his Decision on Remand, the presiding officer, after detailed analysis based upon the rule established in *Setters Landing Realty Trust*, *supra*, found that "the October 26, 2001 decision of the Board, though couched as a grant of a comprehensive permit with conditions, failed to articulate a reasonable basis for the reduction of the development from 37 to 16 units, and therefore should in fact be deemed a denial of the permit." See *9 North Walker St. Dev., Inc. v. Rehoboth*, No 99-03, slip op. at 2-4 (Mass. Housing Appeals Committee Decision on Remand Jun. 28, 2005).

The determination of whether the decision of the Board is a grant with conditions or a denial is one that is normally properly made independently by the presiding officer based upon a preliminary motion. 760 CMR 30.07(2)(f), 30.09(5)(b). Thus, in this case, it was proper for the presiding officer to rule independently on this issue. Nevertheless, in light of the lengthy litigation this matter has entailed, for complete clarity, based upon our review of the presiding officer's analysis, we hereby ratify his finding that the permit in this case should be considered a denial.[3]

III. BURDEN OF PROOF

In all cases, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 760 CMR 31.05. But when a permit has been denied, the developer may establish a prima *facie case* by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton,* No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

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3. We note that the Court has also found that "[a] board's decision serves as the logical source for ascertaining whether the board had a rational basis for reducing the number of houses," and that "the [Rehoboth] Board was without basis in the evidence for arriving at [its] reduction [from 37 to 16 units] based on the 150-foot setback." *9 North Walker St. Dev., Inc. v. Commonwealth*, C.A. No. 2005-00811, slip op. at 13, 15 (Bristol Super. Ct. memorandum of decision Aug. 23, 2006).

IV. LOCAL CONCERNS

A. Stormwater

As noted in our original decision, the developer not only committed to complying with the state Department of Environmental Protection (DEP) Stormwater Management Policy (which is enforced under the Wetlands Protection Act, G.L. c. 131, § 40), but also introduced specific evidence of how the system will comply. Tr. II, 15-39, 79-84.

If there were local stormwater requirements from which the developer were requesting a waiver, the developer's proof would be sufficient to establish its *prima facie* case pursuant to 760 CMR 31.06(2). But logically, the Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the town has not previously regulated the matter in question. See *Walega v. Acushnet*, No. 89-17, slip op. at 6, n. 4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). Since there was no evidence of a local wetlands bylaw or that Rehoboth has enacted stormwater requirements that would apply to market-rate development of this site,[4] to allow the town to regulate such issues for this development would violate the Comprehensive Permit Law's provision that local "requirements and regulations are [to be] applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

The Committee has made exceptions to this general rule, but it cannot be argued here, as in our *North Attleborough* and *Hopedale* cases, that the proposed development is so different from the housing that would have been permitted under existing zoning that it raises stormwater concerns that were not anticipated by the town. See *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 (Mass. Housing Appeals Committee Jul. 12, 1990); *Hamlet Development Corp. v. Hopedale,* No. 90-03, slip op. at 15 (Mass. Housing Appeals Committee Jan. 23, 1992). Nor can it be said, as in *Acushnet* and *Hopedale*, that the stormwater issues are not likely to be considered by any other state agency if they are not considered by the Housing Appeals Committee. See *Acushnet, supra,* slip op. at 6, n.4; *Hopedale, supra*, slip op. at 15. On the contrary, this development, like any other affordable

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4. The Board's expert witnesses acknowledged that the concerns they raised were raised under state law and procedure. See, e.g., Tr. III, 49-50, 99, 103.

housing development proposed under the Comprehensive Permit Law, must comply with the state Wetlands Protection Act (WPA). The developer must apply to the Rehoboth Conservation Commission with regard to WPA issues, and any disputes about compliance will be adjudicated by the state Department of Environmental Protection pursuant to WPA procedures. We find that the Board has not met its burden of proving a local concern that outweighs the regional need for housing.

B. Separation of wells and septic systems

Extensive evidence was received with regard to the location of wells and septic systems for the proposed houses. But unlike the question of stormwater, there is a local regulation of the Rehoboth Board of health that is stricter than state law regulating septic systems, that is, than the requirements in 310 CMR 15.000, or "Title 5." Tr. IV, 80; Exh. 12 (p. 2). Specifically, in order to ensure that drinking water will be safe from nitrates leaching into the groundwater from the septic systems, Rehoboth requires 150 feet of separation between wells and septic systems, while Title 5 requires only 100 feet.

The developer introduced adequate evidence to establish that the proposal will comply with state Title 5 requirements, and therefore has established its *prima facie* case. Tr. II, 25-26, 48; also see Tr. 65-7; Exh. 24 (¶ 2.4). Thus, the question before us is whether the Board introduced sufficient evidence to prove first, that there is a valid local concern that supports the denial of the permit, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6).

As we have noted previously, nitrates in wells are a real public health concern. To protect children's health, there is a federal standard for nitrates in drinking water of 10 milligrams per liter (mg/l or ppm). Tr. II, 75-76; IV, 75. There can be little doubt that Rehoboth's 150-foot separation requirement is related to that concern, and thus is legitimate in the most general sense. But the specific question is whether the Board proved an actual public health risk with regard to this particular site and design, and whether that legitimate local concern outweighs the regional need for housing. That is, is the 150-foot requirement necessary in the specific factual circumstances presented here, or should it be waived?

In addressing this, we note that the 150-foot separation requirement did not establish a nitrate-concentration standard. Thus, we need to refer to the federal standard as a point of

reference in determining whether the proposal creates a public health hazard. That is, conceptually, we must assume that in enacting the 150-foot requirement, Rehoboth, after considering the idiosyncrasies of its soils and geology, had made a judgment that in most locations greater separation was required to meet the drinking water purity standard, and not that it had determined that water deemed safe elsewhere in the country is unsafe for its residents. The question before us is whether the Board proved that the soils and geology of this particular site are such that the 37-unit design would result in nitrate concentrations greater than the federal standard. If so, we must uphold the condition; if not, the 150-foot requirement will be waived.

The developer's position is that the site is atypical, and that the models that dictate separation of wells and septic systems do not apply. See Tr. II, 55-60. The wells will be "driven to depths of 100 to in excess of 300 feet" into sedimentary bedrock. Tr. II, 56. Credible testimony based upon a written report was received from an experienced geologist that the water drawn from such wells "comes from substantial distances away and not from on site." Tr. II, 57; Exh. 24, 25-A, 25-B, 25-C. Further, there was credible testimony from the same expert that the aggregate nitrogen budget for the site shows that ground water concentrations will actually be less than 5 mg/l. Tr. II, 65; Exh. 24.

The Board challenges these conclusions. Its expert geologist testified, also with the support of written reports and graphics, that "the bedrock fractures are connected to the surface more than they are to areas that are far away from the site," and nitrates could flow directly from septic systems into wells. Tr. IV, 64, 29. In addition, he prepared his own nitrogen budget based on a slightly different analysis of hydrogeologic areas within the site, and determined that groundwater concentrations would range from 11 to 14 mg/l. Tr. IV, 45-46; Exh. 21, 28-31.

As just discussed, during the hearing both parties attempted to go beyond the general Title 5 requirements and analysis, and delve into more deeply into esoteric hydrogeologic issues. Through testimony and exhibits, however, neither side explained the hydrogeology of the site clearly, and equally important, neither was able to convincingly identify errors or incorrect assumptions underlying the other's reasoning. Thus, the Board failed to prove either what, if any, scientific basis may underlie the general town requirement for the 150-

foot separation or facts with regard to this particular site that would permit quantification of the alleged environmental damage. We therefore conclude that the Board has failed to prove a legitimate local concern that outweighs the need for housing.[5]

C. Proportion of units to be affordable

There is some ambiguity as to whether there is still a dispute between the developer and the Board as to whether 25% or 30% of the housing units should be reserved as affordable units. This question was considered in our original 2003 decision, where we noted that under the New England Fund program, this figure was frequently the subject of negotiation between the developer and the town. We indicated that if the parties are unable to agree, it could be established by condition, and we then considered the issue in some detail. That entire discussion, however, only makes sense in the context in which a permit has been granted. We have now ruled that the decision was a denial, and therefore any condition imposed is a nullity.[6] The proposal before us is the developer's proposal, in which 25% of the units are affordable. This is entirely appropriate since it is the minimum required under the Comprehensive Permit Law. Thus, the developer has established a *prima facie* case with regard to the percentage of units that will be affordable. We found previously that that "the Board ha[d] not articulated a reasonable factual or legal justification for this condition [requiring greater affordability], and therefore it should be eliminated." We reaffirm that finding, and conclude that the Board has not proven facts that establish a local concern in this regard that outweighs the regional need for housing.

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5. In any case, of course, the developer must comply with all state Title 5 requirements under the supervision of the appropriate local and state officials. Also see § V-2(a). Some of the evidence before us indicates that there is a possibility that due to site design constraints, the number of units constructed may have to be fewer than 37 in order to comply with the Title 5 standards for separation of wells from septic system.

6. This issue is presented in a different posture from the stormwater and septic system issues. No conditions were imposed with regard to either of the latter. But evidence concerning them was presented during the hearing in such a way that it can be analyzed under either the burden of proof that applies when a permit is granted or the burden when a permit is denied. And while the

V. CONCLUSION

Based upon review of the entire record and upon the findings and discussion above, we conclude that the Rehoboth Board of Appeals' denial of a comprehensive permit is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall generally conform to the comprehensive permit filed with the Rehoboth Town Clerk on October 26, 2001 (the 2001 Comprehensive Permit), which is Exhibit 8 in this proceeding. The development, consisting of 37 total units, including 10 affordable units, shall be constructed as shown on drawings by RIM Engineering Co., Inc. dated April 17, 2000, revised October 7, 2001, which are Exhibit 10 in this proceeding.

2. The Comprehensive Permit shall be subject to the following conditions:

(a) Construction shall be in compliance with in 310 CMR 15.000 (Title 5), as determined under standard local and state review procedures.

(b) No further review by the Conservation Commission or other local boards (see, e.g., section D-1(d) of the 2001 Comprehensive Permit) shall be permitted except with regard to issues controlled by state law, e.g., the state Wetlands Protection Act. Also see 760 CMR 31.09.

(c) 25% of the housing units shall be affordable units to be sold to low or moderate income households.

(d) The affordable units shall be sold for $94,500. If, prior to construction, the developer believes that a higher sales price may properly be charged under the requirements of the New England Fund, then, pursuant to the final project approval procedures in 760 CMR 31.09(3),[7] the developer may apply to the Massachusetts Housing Finance Agency

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percentage of affordability issue was raised by a condition included in the Board's decision, as we noted in our original decision, the Board "introduced very little evidence in this regard...."

7. With regard to other aspects of final approval, it appears that pursuant to 760 CMR 31.10, recent changes in § 31.09(3) do not apply to the 9 North Walker Street Development, Inc. proposal. How

(MassHousing) for approval of such higher price. Any such application to MassHousing shall be subject to the payment of such fees as are then in effect.

(e) The Regulatory Agreement, Deed Rider, Monitoring Services Agreement and any related documents shall be reviewed pursuant to the final project approval procedures in 760 CMR 31.09(3), and not by the Board or other town officials or representatives.

(f) In lieu of a subdivision plan, the Board shall, as a ministerial act pursuant to 760 CMR 31.09(3), approve a Comprehensive Permit Plan suitable for recording purposes, and such Plan shall be recorded prior to construction.

3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) All construction shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) All construction shall comply with applicable state laws, and in particular, wetlands crossings and stormwater drainage designs shall be approved under the state Wetlands Protection Act.

(c) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(d) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(e) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the

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such procedures might or might not be applied, however, was not raised during the hearing, and on such matters we defer to the interpretation of the various relevant state and federal agencies.

subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(f) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code. See 760 CMR 31.09(3).

4. Should the Board fail to carry out this order within thirty days, then pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

Housing Appeals Committee

Issued: November 6, 2006

Werner Lohe, Chairman
Presiding Officer

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

LPc\r-d